

108TH CONGRESS  
1ST SESSION

# S. 1358

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JUNE 26, 2003

Mr. AKAKA (for himself, Mr. GRASSLEY, Mr. LEVIN, Mr. LEAHY, and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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## A BILL

To amend chapter 23 of title 5, United States Code, to clarify the disclosures of information protected from prohibited personnel practices, require a statement in nondisclosure policies, forms, and agreements that such policies, forms, and agreements conform with certain disclosure protections, provide certain authority for the Special Counsel, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. PROTECTION OF CERTAIN DISCLOSURES OF IN-**  
2 **FORMATION BY FEDERAL EMPLOYEES.**

3 (a) **SHORT TITLE.**—This Act may be cited as the  
4 “Federal Employee Protection of Disclosures Act”.

5 (b) **CLARIFICATION OF DISCLOSURES COVERED.**—  
6 Section 2302(b)(8) of title 5, United States Code, is  
7 amended—

8 (1) in subparagraph (A)—

9 (A) by striking “which the employee or ap-  
10 plicant reasonably believes evidences” and in-  
11 sserting “, without restriction to time, place,  
12 form, motive, context, or prior disclosure made  
13 to any person by an employee or applicant, in-  
14 cluding a disclosure made in the ordinary  
15 course of an employee’s duties, that the em-  
16 ployee or applicant reasonably believes is evi-  
17 dence of”; and

18 (B) in clause (i), by striking “a violation”  
19 and inserting “any violation”;

20 (2) in subparagraph (B)—

21 (A) by striking “which the employee or ap-  
22 plicant reasonably believes evidences” and in-  
23 sserting “, without restriction to time, place,  
24 form, motive, context, or prior disclosure made  
25 to any person by an employee or applicant, in-  
26 cluding a disclosure made in the ordinary

1 course of an employee's duties, to the Special  
2 Counsel, or to the Inspector General of an  
3 agency or another employee designated by the  
4 head of the agency to receive such disclosures,  
5 of information that the employee or applicant  
6 reasonably believes is evidence of"; and

7 (B) in clause (i), by striking "a violation"  
8 and inserting "any violation (other than a viola-  
9 tion of this section)"; and

10 (3) by adding at the end the following:

11 "(C) a disclosure that—

12 "(i) is made by an employee or appli-  
13 cant of information required by law or Ex-  
14 ecutive order to be kept secret in the inter-  
15 est of national defense or the conduct of  
16 foreign affairs that the employee or appli-  
17 cant reasonably believes is direct and spe-  
18 cific evidence of—

19 "(I) any violation of any law,  
20 rule, or regulation;

21 "(II) gross mismanagement, a  
22 gross waste of funds, an abuse of au-  
23 thority, or a substantial and specific  
24 danger to public health or safety; or

1                   “(III) a false statement to Con-  
2                   gress on an issue of material fact; and

3                   “(ii) is made to—

4                   “(I) a member of a committee of  
5                   Congress having a primary responsi-  
6                   bility for oversight of a department,  
7                   agency, or element of the Federal  
8                   Government to which the disclosed in-  
9                   formation relates and who is author-  
10                  ized to receive information of the type  
11                  disclosed;

12                  “(II) any other Member of Con-  
13                  gress who is authorized to receive in-  
14                  formation of the type disclosed; or

15                  “(III) an employee of Congress  
16                  who has the appropriate security  
17                  clearance and is authorized to receive  
18                  information of the type disclosed.”.

19                  (c) COVERED DISCLOSURES.—Section 2302(b) of  
20                  title 5, United States Code, is amended—

21                   (1) in the matter following paragraph (12), by  
22                   striking “This subsection” and inserting the fol-  
23                   lowing:

24                   “‘This subsection’; and

25                   (2) by adding at the end the following:

1 “In this subsection, the term ‘disclosure’ means a for-  
2 mal or informal communication or transmission.”.

3 (d) REBUTTABLE PRESUMPTION.—Section 2302(b)  
4 of title 5, United States Code, is amended by adding after  
5 the matter following paragraph (12) (as amended by sub-  
6 section (c) of this section) the following:

7 “For purposes of paragraph (8), any presumption re-  
8 lating to the performance of a duty by an employee who  
9 has authority to take, direct others to take, recommend,  
10 or approve any personnel action may be rebutted by sub-  
11 stantial evidence.”.

12 (e) NONDISCLOSURE POLICIES, FORMS, AND AGREE-  
13 MENTS; SECURITY CLEARANCES; AND RETALIATORY IN-  
14 VESTIGATIONS.—

15 (1) PERSONNEL ACTION.—Section  
16 2302(a)(2)(A) of title 5, United States Code, is  
17 amended—

18 (A) in clause (x), by striking “and” after  
19 the semicolon; and

20 (B) by redesignating clause (xi) as clause  
21 (xiv) and inserting after clause (x) the fol-  
22 lowing:

23 “(xi) the implementation or enforce-  
24 ment of any nondisclosure policy, form, or  
25 agreement;

1           “(xii) a suspension, revocation, or  
2           other determination relating to a security  
3           clearance;

4           “(xiii) an investigation of an employee  
5           or applicant for employment because of  
6           any activity protected under this section;  
7           and”.

8           (2) PROHIBITED PERSONNEL PRACTICE.—Sec-  
9           tion 2302(b) of title 5, United States Code, is  
10          amended—

11           (A) in paragraph (11), by striking “or” at  
12          the end;

13           (B) in paragraph (12), by striking the pe-  
14          riod and inserting a semicolon; and

15           (C) by inserting after paragraph (12) the  
16          following:

17           “(13) implement or enforce any nondisclosure  
18          policy, form, or agreement, if such policy, form, or  
19          agreement does not contain the following statement:

20           ““These provisions are consistent with and  
21          do not supersede, conflict with, or otherwise  
22          alter the employee obligations, rights, or liabil-  
23          ities created by Executive Order No. 12958;  
24          section 7211 of title 5, United States Code  
25          (governing disclosures to Congress); section

1           1034 of title 10, United States Code (governing  
2           disclosure to Congress by members of the mili-  
3           tary); section 2302(b)(8) of title 5, United  
4           States Code (governing disclosures of illegality,  
5           waste, fraud, abuse, or public health or safety  
6           threats); the Intelligence Identities Protection  
7           Act of 1982 (50 U.S.C. 421 et seq.) (governing  
8           disclosures that could expose confidential Gov-  
9           ernment agents); and the statutes which protect  
10          against disclosures that could compromise na-  
11          tional security, including sections 641, 793,  
12          794, 798, and 952 of title 18, United States  
13          Code, and section 4(b) of the Subversive Activi-  
14          ties Control Act of 1950 (50 U.S.C. 783(b)).  
15          The definitions, requirements, obligations,  
16          rights, sanctions, and liabilities created by such  
17          Executive order and such statutory provisions  
18          are incorporated into this agreement and are  
19          controlling.’; or

20           “(14) conduct, or cause to be conducted, an in-  
21          vestigation of an employee or applicant for employ-  
22          ment because of any activity protected under this  
23          section.”.

24           (3) BOARD AND COURT REVIEW OF ACTIONS  
25          RELATING TO SECURITY CLEARANCES.—

1 (A) IN GENERAL.—Chapter 77 of title 5,  
2 United States Code, is amended by inserting  
3 after section 7702 the following:

4 **“§ 7702a. Actions relating to security clearances**

5 “(a) In any appeal relating to the suspension, revoca-  
6 tion, or other determination relating to a security clear-  
7 ance, the Merit Systems Protection Board or any review-  
8 ing court—

9 “(1) shall determine whether section 2302 was  
10 violated;

11 “(2) may not order the President to restore a  
12 security clearance; and

13 “(3) subject to paragraph (2), may issue declar-  
14 atory relief and any other appropriate relief.

15 “(b)(1) If, in any final judgment, the Board or court  
16 declares that any suspension, revocation, or other deter-  
17 mination with regards to a security clearance was made  
18 in violation of section 2302, the affected agency shall con-  
19 duct a review of that suspension, revocation, or other de-  
20 termination, giving great weight to the Board or court  
21 judgment.

22 “(2) Not later than 30 days after any Board or court  
23 judgment declaring that a security clearance suspension,  
24 revocation, or other determination was made in violation  
25 of section 2302, the affected agency shall issue an unclas-

1 sified report to the congressional committees of jurisdic-  
 2 tion (with a classified annex if necessary), detailing the  
 3 circumstances of the agency’s security clearance suspen-  
 4 sion, revocation, or other determination. A report under  
 5 this paragraph shall include any proposed agency action  
 6 with regards to the security clearance.

7 “(c) An allegation that a security clearance was re-  
 8 voked or suspended in retaliation for a protected disclo-  
 9 sure shall receive expedited review by the Office of Special  
 10 Counsel, the Merit Systems Protection Board, and any re-  
 11 viewing court.”.

12 (B) TECHNICAL AND CONFORMING  
 13 AMENDMENT.—The table of sections for chap-  
 14 ter 77 of title 5, United States Code, is amend-  
 15 ed by inserting after the item relating to section  
 16 7702 the following:

“7702a. Actions relating to security clearances.”.

17 (f) EXCLUSION OF AGENCIES BY THE PRESIDENT.—  
 18 Section 2302(a)(2)(C) of title 5, United States Code, is  
 19 amended by striking clause (ii) and inserting the following:

20 “(ii)(I) the Federal Bureau of Inves-  
 21 tigation, the Central Intelligence Agency,  
 22 the Defense Intelligence Agency, the Na-  
 23 tional Imagery and Mapping Agency, the  
 24 National Security Agency; and

1           “(II) as determined by the President,  
2           any Executive agency or unit thereof the  
3           principal function of which is the conduct  
4           of foreign intelligence or counterintel-  
5           ligence activities, if the determination (as  
6           that determination relates to a personnel  
7           action) is made before that personnel ac-  
8           tion; or”.

9           (g) ATTORNEY FEES.—Section 1204(m)(1) of title 5,  
10 United States Code, is amended by striking “agency in-  
11 volved” and inserting “agency where the prevailing party  
12 is employed or has applied for employment”.

13           (h) DISCIPLINARY ACTION.—Section 1215 of title 5,  
14 United States Code, is amended in subsection (a), by  
15 striking paragraph (3) and inserting the following:

16           “(3)(A) A final order of the Board may im-  
17           pose—

18           “(i) disciplinary action consisting of re-  
19           moval, reduction in grade, debarment from  
20           Federal employment for a period not to exceed  
21           5 years, suspension, or reprimand;

22           “(ii) an assessment of a civil penalty not to  
23           exceed \$1,000; or

1           “(iii) any combination of disciplinary ac-  
2           tions described under clause (i) and an assess-  
3           ment described under clause (ii).

4           “(B) In any case in which the Board finds that  
5           an employee has committed a prohibited personnel  
6           practice under section 2302(b) (8) or (9), the Board  
7           shall impose disciplinary action if the Board finds  
8           that the activity protected under section 2302(b) (8)  
9           or (9) was a significant motivating factor, even if  
10          other factors also motivated the decision, for the em-  
11          ployee’s decision to take, fail to take, or threaten to  
12          take or fail to take a personnel action, unless that  
13          employee demonstrates, by preponderance of evi-  
14          dence, that the employee would have taken, failed to  
15          take, or threatened to take or fail to take the same  
16          personnel action, in the absence of such protected  
17          activity.”.

18          (i) DISCLOSURES TO CONGRESS.—Section 2302 of  
19          title 5, United States Code, is amended by adding at the  
20          end the following:

21          “(f) Each agency shall establish a process that pro-  
22          vides confidential advice to employees on making a lawful  
23          disclosure to Congress of information that is specifically  
24          required by law or Executive order to be kept secret in

1 the interest of national defense or the conduct of foreign  
2 affairs.”.

3 (j) AUTHORITY OF SPECIAL COUNSEL RELATING TO  
4 CIVIL ACTIONS.—

5 (1) REPRESENTATION OF SPECIAL COUNSEL.—

6 Section 1212 of title 5, United States Code, is  
7 amended by adding at the end the following:

8 “(h) Except as provided in section 518 of title 28,  
9 relating to litigation before the Supreme Court, attorneys  
10 designated by the Special Counsel may appear for the Spe-  
11 cial Counsel and represent the Special Counsel in any civil  
12 action brought in connection with section 2302(b)(8) or  
13 subchapter III of chapter 73, or as otherwise authorized  
14 by law.”.

15 (2) JUDICIAL REVIEW OF MERIT SYSTEMS PRO-  
16 TECTION BOARD DECISIONS.—Section 7703 of title  
17 5, United States Code, is amended by adding at the  
18 end the following:

19 “(e)(1) Except as provided under paragraph (2), this  
20 paragraph shall apply to any review obtained by the Spe-  
21 cial Counsel. The Special Counsel may obtain review of  
22 any final order or decision of the Board by filing a petition  
23 for judicial review in the United States Court of Appeals  
24 for the Federal Circuit if the Special Counsel determines,  
25 in the discretion of the Special Counsel, that the Board

1 erred in deciding a case arising under section 2302(b)(8)  
2 or subchapter III of chapter 73 and that the Board's deci-  
3 sion will have a substantial impact on the enforcement of  
4 section 2302(b)(8) or subchapter III of chapter 73. If the  
5 Special Counsel was not a party or did not intervene in  
6 a matter before the Board, the Special Counsel may not  
7 petition for review of a Board decision under this section  
8 unless the Special Counsel first petitions the Board for  
9 reconsideration of its decision, and such petition is denied.  
10 In addition to the named respondent, the Board and all  
11 other parties to the proceedings before the Board shall  
12 have the right to appear in the proceedings before the  
13 Court of Appeals. The granting of the petition for judicial  
14 review shall be at the discretion of the Court of Appeals.

15       “(2) During the 5-year period beginning on the effec-  
16 tive date of the Federal Employee Protection of Disclo-  
17 sures Act, this paragraph shall apply to any review ob-  
18 tained by the Special Counsel. The Special Counsel may  
19 obtain review of any final order or decision of the Board  
20 by filing a petition for judicial review in the United States  
21 Court of Appeals for the Federal Circuit or any court of  
22 appeals of competent jurisdiction as provided under sub-  
23 section (b)(2) if the Special Counsel determines, in the dis-  
24 cretion of the Special Counsel, that the Board erred in  
25 deciding a case arising under section 2302(b)(8) or sub-

1 chapter III of chapter 73 and that the Board’s decision  
2 will have a substantial impact on the enforcement of sec-  
3 tion 2302(b)(8) or subchapter III of chapter 73. If the  
4 Special Counsel was not a party or did not intervene in  
5 a matter before the Board, the Special Counsel may not  
6 petition for review of a Board decision under this section  
7 unless the Special Counsel first petitions the Board for  
8 reconsideration of its decision, and such petition is denied.  
9 In addition to the named respondent, the Board and all  
10 other parties to the proceedings before the Board shall  
11 have the right to appear in the proceedings before the  
12 court of appeals. The granting of the petition for judicial  
13 review shall be at the discretion of the court of appeals.”.

14 (k) JUDICIAL REVIEW.—

15 (1) IN GENERAL.—Section 7703(b) of title 5,  
16 United States Code, is amended by striking para-  
17 graph (1) and inserting the following:

18 “(b)(1)(A) Except as provided in subparagraph (B)  
19 and paragraph (2) of this subsection, a petition to review  
20 a final order or final decision of the Board shall be filed  
21 in the United States Court of Appeals for the Federal Cir-  
22 cuit. Notwithstanding any other provision of law, any peti-  
23 tion for review must be filed within 60 days after the date  
24 the petitioner received notice of the final order or decision  
25 of the Board.

1       “(B) During the 5-year period beginning on the effec-  
2 tive date of the Federal Employee Protection of Disclo-  
3 sures Act, a petition to review a final order or final deci-  
4 sion of the Board shall be filed in the United States Court  
5 of Appeals for the Federal Circuit or any court of appeals  
6 of competent jurisdiction as provided under subsection  
7 (b)(2). Notwithstanding any other provision of law, any  
8 petition for review must be filed within 60 days after the  
9 date the petitioner received notice of the final order or  
10 decision of the Board.”.

11           (2) REVIEW OBTAINED BY OFFICE OF PER-  
12 SONNEL MANAGEMENT.—Section 7703 of title 5,  
13 United States Code, is amended by striking sub-  
14 section (d) and inserting the following:

15       “(d)(1) Except as provided under paragraph (2), this  
16 paragraph shall apply to any review obtained by the Direc-  
17 tor of the Office of Personnel Management. The Director  
18 of the Office of Personnel Management may obtain review  
19 of any final order or decision of the Board by filing, within  
20 60 days after the date the Director received notice of the  
21 final order or decision of the Board, a petition for judicial  
22 review in the United States Court of Appeals for the Fed-  
23 eral Circuit if the Director determines, in his discretion,  
24 that the Board erred in interpreting a civil service law,  
25 rule, or regulation affecting personnel management and

1 that the Board's decision will have a substantial impact  
2 on a civil service law, rule, regulation, or policy directive.  
3 If the Director did not intervene in a matter before the  
4 Board, the Director may not petition for review of a Board  
5 decision under this section unless the Director first peti-  
6 tions the Board for a reconsideration of its decision, and  
7 such petition is denied. In addition to the named respond-  
8 ent, the Board and all other parties to the proceedings  
9 before the Board shall have the right to appear in the pro-  
10 ceeding before the Court of Appeals. The granting of the  
11 petition for judicial review shall be at the discretion of the  
12 Court of Appeals.

13       “(2) During the 5-year period beginning on the effec-  
14 tive date of the Federal Employee Protection of Disclo-  
15 sures Act, this paragraph shall apply to any review ob-  
16 tained by the Director of the Office of Personnel Manage-  
17 ment. The Director of the Office of Personnel Manage-  
18 ment may obtain review of any final order or decision of  
19 the Board by filing, within 60 days after the date the Di-  
20 rector received notice of the final order or decision of the  
21 Board, a petition for judicial review in the United States  
22 Court of Appeals for the Federal Circuit or any court of  
23 appeals of competent jurisdiction as provided under sub-  
24 section (b)(2) if the Director determines, in his discretion,  
25 that the Board erred in interpreting a civil service law,

1 rule, or regulation affecting personnel management and  
2 that the Board's decision will have a substantial impact  
3 on a civil service law, rule, regulation, or policy directive.  
4 If the Director did not intervene in a matter before the  
5 Board, the Director may not petition for review of a Board  
6 decision under this section unless the Director first peti-  
7 tions the Board for a reconsideration of its decision, and  
8 such petition is denied. In addition to the named respond-  
9 ent, the Board and all other parties to the proceedings  
10 before the Board shall have the right to appear in the pro-  
11 ceeding before the court of appeals. The granting of the  
12 petition for judicial review shall be at the discretion of the  
13 Court of Appeals.”.

14 (l) NONDISCLOSURE POLICIES, FORMS, AND AGREE-  
15 MENTS.—

16 (1) IN GENERAL.—

17 (A) REQUIREMENT.—Each agreement in  
18 Standard Forms 312 and 4414 of the Govern-  
19 ment and any other nondisclosure policy, form,  
20 or agreement of the Government shall contain  
21 the following statement: “These restrictions are  
22 consistent with and do not supersede, conflict  
23 with, or otherwise alter the employee obliga-  
24 tions, rights, or liabilities created by Executive  
25 Order No. 12958; section 7211 of title 5,

1 United States Code (governing disclosures to  
2 Congress); section 1034 of title 10, United  
3 States Code (governing disclosure to Congress  
4 by members of the military); section 2302(b)(8)  
5 of title 5, United States Code (governing disclo-  
6 sures of illegality, waste, fraud, abuse or public  
7 health or safety threats); the Intelligence Iden-  
8 tities Protection Act of 1982 (50 U.S.C. 421 et  
9 seq.) (governing disclosures that could expose  
10 confidential Government agents); and the stat-  
11 utes which protect against disclosure that may  
12 compromise the national security, including sec-  
13 tions 641, 793, 794, 798, and 952 of title 18,  
14 United States Code, and section 4(b) of the  
15 Subversive Activities Act of 1950 (50 U.S.C.  
16 783(b)). The definitions, requirements, obliga-  
17 tions, rights, sanctions, and liabilities created  
18 by such Executive order and such statutory  
19 provisions are incorporated into this agreement  
20 and are controlling.”

21 (B) ENFORCEABILITY.—Any nondisclosure  
22 policy, form, or agreement described under sub-  
23 paragraph (A) that does not contain the state-  
24 ment required under subparagraph (A) may not  
25 be implemented or enforced to the extent such

1 policy, form, or agreement is inconsistent with  
2 that statement.

3 (2) PERSONS OTHER THAN GOVERNMENT EM-  
4 PLOYEES.—Notwithstanding paragraph (1), a non-  
5 disclosure policy, form, or agreement that is to be  
6 executed by a person connected with the conduct of  
7 an intelligence or intelligence-related activity, other  
8 than an employee or officer of the United States  
9 Government, may contain provisions appropriate to  
10 the particular activity for which such document is to  
11 be used. Such form or agreement shall, at a min-  
12 imum, require that the person will not disclose any  
13 classified information received in the course of such  
14 activity unless specifically authorized to do so by the  
15 United States Government. Such nondisclosure  
16 forms shall also make it clear that such forms do  
17 not bar disclosures to Congress or to an authorized  
18 official of an executive agency or the Department of  
19 Justice that are essential to reporting a substantial  
20 violation of law.

21 (m) CLARIFICATION OF WHISTLEBLOWER RIGHTS  
22 FOR CRITICAL INFRASTRUCTURE INFORMATION.—Section  
23 214(e) of the Homeland Security Act of 2002 (Public Law  
24 107–296) is amended by adding at the end the following:  
25 “For purposes of this section a permissible use of inde-

1 pendently obtained information includes the disclosure of  
2 such information under section 2302(b)(8) of title 5,  
3 United States Code.”.

4 (n) EFFECTIVE DATE.—This Act shall take effect 30  
5 days after the date of enactment of this Act.

○